IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 5TH JUNE 2007 / 15TH JYAISHTA 1929

CRL.A.No. 910 of 2007()

CC.2729/2001 of ADDL.CHIEF JUDICIAL MAGISTRATE, ERNAKULAM

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APPELLANT: COMPLAINANT

SANTHA THANKAPPAN,
CHERUPILLIL HOUSE, PUTHIYA ROAD,
EROOR (NORTH), TRIPUNITHURA.

BY ADV. SRI.BOBY MATHEW

RESPONDENTS: ACCUSED & THE STATE

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1. K.RAJAGOPAL,
ADVOCATE, PARAMESWAR BHAVAN, VENDAR,
KOTTARAKKARA, PIN 691 506.

2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.S.DILEEP FOR R2

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 05/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. Thankappan, J.

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Crl.A. No. 910 of 2007

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Dated this the 5th day of June, 2007

JUDGMENT

The appeal is filed by the complainant against the acquittal order passed in C.C.No. 2729/2001 on the file of the Addl. Chief Judicial Magistrate's Court, Ernakulam. The 1st respondent was the accused in the complaint.

2. When leave to appeal has been admitted, notice has been ordered to the 1st respondent. In the above petition notice was served on the 1st respondent by affixture in his last known address. In the above circumstances, this Court is of the view that it is not necessary to issue notice to the 1st respondent in the appeal. Hence, notice to the 1st respondent is dispensed with.

3. After going through the impugned judgment, it is seen that the acquittal order was passed due to the absence of the appellant. Learned counsel for the appellant submits that the case was posted to 30-11-2004 for

appearance of the 1st respondent. The learned counsel also submits that as the appellant was laid up, she could not appear before the court and an application for excusing her absence was also filed before the court.

4. This Court finds that the order under challenge is not in accordance with the principles laid down by this Court in decisions reported in Don Bosco V. Partech Computers Ltd. (2005(2) KLT 1003), G.F.S. Chits & Loans (P) Ltd. V. Rajesh (2006(3) KLT 825) and a decision of the Apex Court reported in Associated Cements Co. Ltd. V. Keshwanand (1998(1) KLT 179 (S.C.). In Don Bosco V. Partech Computers Ltd. (Supra) this Court held that "**the Magistrate did not apply his judicial discretion with the required caution, while dismissing the complaint and acquitting the accused".** In G.F.S.Chits & Loans (P) Ltd. V. Rajesh (Supra) this Court held that the courts should also bear-in-mind that unmerited, thoughtless disposal gives wrong signal to the society, staking even public confidence in the system of administration of justice. In paragraph 17 of 1998(1) KLT 179 (Supra) the Apex Court held as follows:-

> "17. Reading the section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate considers that personal attendance of the complainant is not necessary on that

> day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

A reading of the impugned order would not show that the personal attendance of the appellant is essential on that day.

5. In the above circumstances, this Court is of the view that the order under challenge is liable to be set aside and the matter has to be remitted to the trial court for fresh consideration. Ordered accordingly. The trial court is directed to consider the matter afresh as per law.

6. The appeal is allowed as above.

7. The appellant shall appear before the court below on 30-6-2007. On appearance of the appellant, the trial court shall take steps to get the presence of the 1st respondent by issuing fresh process.

8. The records of the case shall be forwarded to the trial court forthwith.

K. Thankappan,
Judge.

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It is relelvant to note that only because of the absence of the appellant, the 1st rspondent is dragged to this Court. Hence, it is only proper for this Court to allow a reasonable costs to the 1st respondent. Therefore, the appellant is directed to deposit before the court below an amount of Rs.2,000/- on or before the date of posting of the case. If the amount is deposited, the 1st respondent is permitted to withdraw the same.

K. Thankappan,J.

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Crl.A.910 of 2007

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Judgment
5-6-2007